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Nos. 96-1550 and 1551

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

THE NATIONAL FEDERATION OF THE BLIND, DONALD J. MORRIS, and MARYLAND STATE DEPARTMENT OF EDUCATION, DIVISION OF REHABILITATION SERVICES,
Petitioners,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE NATIONAL COUNCIL OF STATE AGENCIES FOR THE BLIND AND THE NATIONAL ASSOCIATION OF SOCIAL WORKERS AS *AMICI CURIAE* SUPPORTING PETITIONERS

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BRIEF OF THE NATIONAL COUNCIL OF STATE AGENCIES FOR THE BLIND AND THE NATIONAL ASSOCIATION OF SOCIAL WORKERS AS *AMICI CURIAE* SUPPORTING PETITIONERS

This Brief *Amicus Curiae* of the National Council of State Agencies for the Blind ("NCSAB") and the National Association of Social Workers ("NASW") is submitted pursuant to Supreme Court Rule 37. The NCSAB has sought and obtained consent from Petitioners and Respondents to file this Brief and, thus, this Brief is submitted without a motion pursuant to Supreme Court Rule 37.*

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* Pursuant to Supreme Court Rule 37.6, counsel of record for the NCSAB, Attorney Jack Duncan, did in part author this Brief *Amici Curiae*. Attorney Craig Galle of the St. Louis, Missouri law firm of Greensfelder, Hemker & Gale substantially contributed to the authorship of this Brief. Mr. Galle was retained by and was paid

STATEMENT OF INTEREST

The Maryland State Department of Education, Division of Rehabilitation Services ("MSDE"), one of the Petitioners for a Writ of Certiorari in the case at bar, is a State Licensing Agency ("SLA") within the meaning of the Randolph-Sheppard Act, 20 U.S.C. § 107, *et seq.* The NCSAB is an organization consisting of SLAs from each of the fifty States in the United States. The MSDE is one of the members of the NCSAB, and it is for this reason that the NCSAB submits this Brief *Amicus Curiae* in support of the Petitions filed in this case by the MSDE and the National Federation of the Blind and Donald J. Morris ("NFB").

The National Association of Social Workers (NASW) is the largest association of professional social workers in the world with over 155,000 members and 55 chapters nationally and internationally. The Maryland Chapter of NASW represents social workers in Maryland with over 4,200 members. Founded in 1955 from the merger of seven predecessor social work organizations, NASW is devoted to promoting the quality and effectiveness of social work practice and to the development and application of NASW's policy statement on "People with Disabilities."

As stated in this policy statement, NASW supports the rights of people with disabilities to participate fully and equitably in society. These rights include the freedom, to the fullest extent possible, of all people with disabilities to live independently, to enjoy the rights of full societal membership, to exercise self-determination, and to have full participation in issues related to education, housing, transportation, work, healthcare, social services, and other public accommodations."

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by the NCSAB, and is thus also counsel for the NCSAB. The NCSAB is solely responsible for all costs incurred for the preparation, filing and service of this Brief, and no monetary contribution to the preparation or submission of this Brief has been made by any other party.

STATEMENT OF THE CASE

The NCSAB and NASW adopt the Statement contained in the MSDE's Petition as supplemented by the Statement contained in the NFB's Petition.

SUMMARY OF ARGUMENT

Because the civil rights of the blind have been placed in jeopardy by the decision of the Court below, and because of the confusion which exists concerning the Act in general, the NCSAB respectfuly but strenuously urges this Court to exercise its Certiorari Jurisdiction in order to clarify the responsibilities of the States under the Act. The NCSAB and NASW further urge this Court to take Certiorari Jurisdiction of this case in order to determine exactly how and to what degree the Randolph-Sheppard Act ought to be construed with and applied like the Rehabilitation Act of 1973, and other similar civil rights statutes.

In order to insure uniformity of enforcement throughout the Nation, the NCSAB and NASW also urge that this Court clarify the powers of the Secretary of Education under the Act.

ARGUMENT

I. THE PROFOUND CONFUSION REGARDING THE ACT MAKES IT PRACTICALLY IMPOSSIBLE FOR STATE AGENCIES TO ABIDE BY, LET ALONE ENFORCE, THIS FEDERAL LAW.

The Petitions of the MSDE and the NFB amply chronicle the split in the Circuits concerning the meaning and scope of the Act, and the NCSAB and NASW concur that such a split in and of itself is a sound reason for this Court to issue a Writ of Certiorari in the case at bar. However, from the perspective of the State agencies that must enforce this Act, a far more cogent basis for requesting this Court to exercise Certiorari Jurisdiction over the case at bar is the profound confusion and uncertainty which exists concerning the meaning of the Act, and the

resulting doubt as to just how the States are to insure compliance with the Act.

The confusion which manifestly exists among the Circuits concerning the Act has, as a pratical matter, made it virtually impossible for the States to protect blind vendors who must make their living on federal property, which clearly is a central responsibility of the States under the Act. Because this confusion involves the most fundamental civil rights of a large number of blind citizens in this Country, it is particularly appropriate for this Court to exercise its Certiorari Jurisdiction to resolve that confusion.

The States in this Nation, through and by their SLAs, have been given the responsibility of finding and securing employment opportunities for blind citizens on federal property. 20 U.S.C. § 107a(b). The Act by its terms is not an affirmative action statute, but is rather more in the nature of a precursor to the "welfare to work" statutes which are now popular in a number of States, such as Wisconsin. *Cf.* Wis. Stat. § 49.29.[1]

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[1] The Act essentially is an employment law providing for the employment opportunities and working conditions of blind vendors. In effect, a blind vendor under the Act operates a small business enterprise in partnership with a state licensing agency under the authority of 20 U.S.C. § 107b; *cf.* 34 C.F.R. §§ 395.4, 395.6, and 395.7. Apparently, Congress intended state licensing agencies to be senior partners in that partnershlip. *See, e.g.*, 20 U.S.C. § 107d-3(a), which authorizes the state licensing agency to place a ceiling on the amount of income that a blind licensee can receive from vending machines on federal property. *Cf.* 34 C.F.R. § 395.5 and § 395.8. Consistent with the interpretation that the act is an employment law, 34 C.F.R. § 395.11 mandates that state licensing agencies provide vocational and other training services to blind vendors, including on-the-job training in all aspects of vending facility operation. Moreover, each state licensing agency must, in issuing licenses for the operation of blind vending facilities on federal property, give preference to blind persons in need of employment. 20 U.S.C. § 107a(b).

Because blind vendors earn money which is subject to control by state licensing agencies (34 C.F.R. § 395.8 and § 395.9) and federal

Congress, in its wisdom, has mandated that the States, again through and by their SLAs, must insure that the several federal agencies provide appropriate space for blind vending stands on federal property administered by the federal agencies.[2] Congress has further mandated that the States, again through and by their SLAs, are responsible for enforcing the provisions of the Act against federal agencies, and for safeguarding the working conditions, and by implication the civil rights, of blind citizens on federal property.

The sole and exclusive method by which the SLAs are to accomplish this task is by means of an arbitration panel convened pursuant to the very provision of the

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property managers (34 C.F.R. § 395.32), and because the working conditions and other conditions of employment of the blind vendor are regulated in detail by state licensing agencies (34 C.F.R. § 395.6 and § 395.10), it is not at all surprising to find Congress speaking in terms of the "final and binding arbitration of disputes" arising between the parties subject to the Act.

[2] 20 U.S.C. § 107a(d)(1), which provides:

> After January 1, 1975, no department, agency, or instrumentality of the United States shall undertake to acquire by ownership, rent, lease, or to otherwise occupy, in whole or in part, any building unless, after consultation with the head of such department, agency, or instrumentality and the State licensing agency, it is determied by the Secretary that (A) such building includes a satisfactory site or sites for the location and operation of a vending facility by a blind person, or (B) if a building is to be constructed, substantially altered, or renovated, or in the case of a building that is already occupied on such date by such department, agency, or instrumentality, is to be substantially altered or renovated for use by such department, agency, or instrumentality, the design for such construction, substantial alteration, or renovation includes a satisfactory site or sites for the location and operation of a vending facility by a blind person. Each such department, agency, or instrumentality shall provide notice to the appropriate State licensing agency of its plans for occupation, acquisition, renovation, or relocation of a building adequate to permit such State agency to determine whether such building includes a satisfactory site or sites for a vending facility.

Act which is at issue in the case at bar, *i.e.*, 20 U.S.C. § 107d-1(b).

The SLAs are completely at a loss as to how they can comply with the requirements of the Act when they are faced with decisions, such as the one below, which hold that panels convened pursuant to § 107d-1 have no remedial powers whatsoever. *Maryland State Department of Education v. United States Department of Veterans Affairs*, 98 F.3d 165, 168 (4th Cir. 1996); *Georgia Department of Health and Social Services v. Nash*, 915 F.2d 1482, 1492 (11th Cir. 1990). The SLAs' consternation is exacerbated by the fact the SLAs are faced with obstinate federal agencies which force the SLAs into long and protracted litigation attempting to obtain compliance with panel decisions in Circuits where the decisions of the panels are deemed to have remedial powers. *See, e.g., Minnesota Department of Jobs & Training v. Riley*, 18 F.3d 606 (8th Cir. 1994) and *Minnesota Department of Economic Security v. Riley*, 107 F.3d 648 (8th Cir. 1997).

Candidly, the SLAs are confused and frustrated. Tragically, their confusion and frustration implicates and affects not just the interests of the States, but also the rights of blind vendors. In point of fact, the uncertainty and inability of the SLAs to fulfill their mandate under the Act effects adversely the most fundamental civil rights of the blind citizens who have acquired substantial property interests, and must make their living under the Act in the States of the Nation.

The Secretary of Education, who should assist the States in resolving this uncertainty, has been inexplicably silent throughout much of the litigation concerning the Act, adding to the confusion about how the SLAs are to comply with the requirements of the Act.

The fact that the DVA did not seek appropriate approval from the Secretary of Education for the DVA's attempted limitation in the case at bar on the placement

of a blind vending stand at the VAMC under 20 U.S.C. § 107(b) was placed in issue by the NFB in its Brief *Amicus Curiae,* filed with the Court of Appeals on November 21, 1995. Nevertheless, the Court below did not address this fact, nor did it address the absence of the Secretary of Education as a party to the proceedings below.

The NCSAB and NASW earnestly request that this Court exercise its Certiorari Jurisdiction in order to clarify the responsibilities of the States under the Act.

II. BECAUSE THE ACT IS A CIVIL RIGHTS STATUTE, AND BECAUSE THE RIGHTS OF THE BLIND UNDER THE ACT HAVE BEEN IMPERILED BY THE DECISION BELOW, THERE IS AN URGENT NEED TO RECEIVE CLARIFICATION FROM THIS COURT.

While not styled as such, the Randolph-Sheppard Act is a civil rights statute and ought to be construed accordingly. Moreover, according to *3 Sutherland on Statutory Construction* § 60.01, at p. 147 (5th ed. 1992):

> Remedial statutes are liberally construed to suppress the evil and advance the remedy. The policy that a remedial statute should be liberally construed in order to effectuate the remedial purpose for which it was enacted is firmly established.

A. The Randolph-Sheppard Act and the Rehabilitation Act of 1973 Are Closely Related "Sister Acts," and Ought to Be Read and Construed Together.

The legislative history underlying the Randolph-Sheppard Act demonstrates that the 1974 Amendments to the Randolph-Sheppard Act, the Rehabilitation Act of 1973, and the Americans With Disabilities Act of 1990 ("ADA") are very closely related civil rights laws, and thus ought to be read and construed as though part of the same Act.

In fact, Congress originally intended that the 1974 Amendments to the Randolph-Sheppard Act and the Re-

habilitation Act of 1973, 29 U.S.C. § 701, *et seq.*, were to be combined in the same legislation. Indeed, the 1974 Amendments to the Randolph-Sheppard Act were originally included as a separate title to the Rehabilitation Act but were segregated from the Rehabilitation Act at the last moment because of a "point of order" in the House under its germaneness rule.

> On September 14, 1971, I [Sen. Randolph] introduced S.2506, the 'Randolph-Sheppard Act for the Blind Amendments of 1971.' Hearings were held on that measure in September, October, and December of 1971. The provisions, again very similar to those in the bill I am introducing, were included as a title in the Senate's Rehabilitation Act of 1972. Unfortunately, when that measure was brought to conference, the House conferees indicated that the Randolph-Sheppard provisions would be subject to a point of order in the House because of its germaneness rule. The provisions were dropped from the conference report, with the explicit understanding of the need for action.

119 Cong. Rec. 34,082 (1973).

Rather than delay the enactment of the Rehabilitation Act pending a resolution of the point of order issue, Congress merely segregated out the Randolph-Sheppard Act 1974 Amendments and passed the Rehabilitation Act of 1973 forthwith with the stated intention of addressing and enacting the Randolph-Sheppard Amendments in its next term. *Id.*

The legislative history of the Rehabilitation Act of 1973 reinforces the foregoing affinity betwen that Act and the Randolph-Sheppard Act. The Rehabilitation Act "in effect strengthens the Randolph-Sheppard Act and gives added protection to the blind." 120 Cong. Rec. 35,712 (1974). Moreover, that same legislative history clearly demonstrates that the Randolph-Sheppard Act was "the third in a series of bills" on the subject of protecting and affording rights to the disabled. 120 Cong. Rec.

20,117 (1974) (statements of Sen. Randolph). Because the 1974 Amendments to the Randolph-Sheppard Act and the Rehabilitation Act of 1973 were a part of the same legislation, it leads to the inescapable conclusion that they are to be interpreted in the same manner. *Cf.* 120 Cong. Rec. 35,712 (1974).

Similarly, the ADA is to be judicially interpreted in the same manner as the Rehabilitation Act of 1973. *Collings v. Longview Fibre Co.*, 63 F.3d 828, 832, n.3 (9th Cir. 1995), *cert. denied*, —— U.S. ——, 116 S.Ct. 711, 133 L.Ed.2d 666 (1996). This determination is based on the substantially identical language in the two Acts and the legislative history of the ADA which indicates that Congress intended judicial interpretation of the Rehabilitation Act to be incorporated by reference into the interpretation of the ADA. *Id.*

It is well recognized that both the ADA and the Rehabilitation Act of 1973 were enacted by Congress pursuant to its authority under the Fourteenth Amendment to the United States Constitution. In turn, as this Court has often held, the Fourteenth Amendment incorporates by reference the Bill of Rights to the United States Constitution. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990); *Klopfer v. North Carolina*, 386 U.S. 213, 222 (1967).

The ADA specifically states that its purpose is "to invoke the sweep of Congressional authority, including the power to enforce the Fourteenth Amendment and to regulate commerce, in order to address the major areas of discrimination faced day to day by people with disabilities." 42 U.S.C. § 12101(b)(4); *see also Mayer v. University of Minnesota*, 940 F. Supp. 1474, 1480 (D. Minn. 1996) (ADA was enacted pursuant to the Fourteenth Amendment). Similarly, courts have repeatedly held that the Rehabilitation Act of 1973 was enacted by the Congress pursuant to the Fourteenth Amendment to the United States Constitution. *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 472, n.2

(1987); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243-244 (1985); *Union Pacific Railroad Co. v. Burton*, 1996 WL 733943, *9 (D. Wy. Dec. 24, 1996).

Because the 1974 Amendments to the Randolph-Sheppard Act and the Rehabilitation Act of 1973 were originally intended to be a part of the same legislation, and since the Randolph-Sheppard Act Amendments were in their pre-inception a sub-title to what became the Rehabilitation Act of 1973, it follows that, like the Rehabilitation Act and the ADA, the Randolph-Sheppard Act Amendments were also enacted pursuant to the Fourteenth Amendment. Thus, a Randolph-Sheppard Act arbitration panel convened pursuant to 20 U.S.C. § 107d-1(a) may properly award damages against a State, despite the Eleventh Amendment. *Delaware Department of Health and Social Services v. United States Department of Education*, 772 F.2d 1123 (3rd Cir. 1985). Similarly, an arbitration panel convened pursuant to 20 U.S.C. § 107d-1(b) is also authorized to award damages or provide for other relief against federal agencies. *Cf. Texas State Commission for the Blind v. United States*, 796 F.2d 400 (Fed. Cir. 1986).

While federal executive agencies are exempt from the ADA, they are covered by §§ 501 and 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 791, 794, which incorporate the remedies, procedures and rights set forth in Title VII (42 U.S.C. § 2000e-16(c)) for federal employees. 29 U.S.C. § 794a(a)(1). According to Lindemann & Grossman, 1 *Employment Discrimination Law* 336 (ABA 1996):

> The 1978 amendments to the Rehabilitation Act provide that the remedies and procedures for implementing and enforcing § 717 of Title VII also apply to § 501 [of the Rehabilitation Act]. The charge-filing, investigation, and hearing procedures, including awards of attorney's fees, are the same for federal employees under § 501 as they are under Title VII and the Age Discrimination in Employment Act.

Admittedly, the Randolph-Sheppard Act takes a circuitous route to establish employment opportunities for blind vendors, but those vendors are nevertheless self-employed licensees of the SLAs (in effect business partners with the several SLAs) who must make their living on federal property.[8] Like federal employees under the Rehabilitation Act of 1973, the blind vendors, or more properly SLAs on their behalf, should have the ability to pursue remedies against federal agencies when those agencies create unacceptable working conditions for blind vendors or otherwise limit their employment opportunities through and by SLA arbitrations pursuant to 20 U.S.C. § 107d-1(b). It is not at all surprising to find Congress speaking in terms of the "final and binding arbitration of disputes" arising between the parties subject to the Act given the Act's similarity to other employment discrimination laws and the following considerations: a) blind vendors earn money which is subject to control by state licensing agencies (34 C.F.R. § 395.8 and § 395.9) and federal property managers (34 C.F.R. § 395.32); and b) the working conditions and other conditions of em-

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[8] In order to insure that blind licencees have employment opportunities, the Act authorizes state licensing agencies to secure space on property owned by federal agencies sufficient to accommodate blind vendor stands. *See, e.g.*, 34 C.F.R. § 395.30 and § 395.31. At least in part, federal property managers have the right to exercise control over income belonging to blind vendors (34 C.F.R. § 395.32), which right carries with it, in the view of the NCSAB and NASW, fiduciary responsibilities by clear implication.

Congress mandated that state licensing agencies and federal property managers must cooperate to insure compliance with civil rights and other laws by blind vendors on federal property. 34 C.F.R. § 395.35 and § 395.36.

A state licensing agency is, in fact, authorized to assume some of the responsibilities customarily performed by an employer *vis-à-vis* a blind vendor. For example, a state licensing agency is authorized to set aside funds from the net proceeds of the operation of vending facilities for the purposes of "the establishment . . . of retirement and pension funds, health insurance contributions, and provision for paid sick leave and vacation time . . . ." 34 C.F.R. § 395.5(5).

ployment of the blind vendor are regulated in detail by the SLAs (34 C.F.R. § 395.6 and § 395.10).

The NCSAB and NASW respectfully submit that this Court ought to take Certiorari Jurisdiction of this case in order to determine exactly how and to what degree the Randolph-Sheppard Act is to be construed with and applied like the Rehabilitation Act of 1973.

B. Because Safeguards Which Exist Under Other Federal Civil Rights Statutes Are Unavailable Under the Act, the Guidance of This Court Is Urgently Needed in Order to Vouchsafe the Civil Rights of the Blind.

Under Executive Order 12,067,[4] the EEOC is responsible for coordinating the federal effort to enforce federal equal employment opportunity laws. According to Lindemann & Grossman, *supra,* Volume II, at pp. 1245-46:

> The EEOC coordinates with other [federal] agencies in carrying out overlapping mandates. . . . The EEOC . . . has responsibility for investigating employment discrimination complaints against recipients of federal financial assistance subject to Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments Act of 1972, and other similar statutes, where the complaints also allege Title VII, ADA, or Equal Pay Act violations.

Notably missing from the EEOC's jurisdictional responsibilities are the blind under the Act. Instead, the States have been thrust into the role of the EEOC *vis-à-vis* the rights of the blind, and the States are hard-pressed to fulfill this serious duty given the holding of the Court below and the confusion which presently exists concerning the scope and meaning of the Act throughout the Circuit Court of Appeal.

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[4] 43 Fed. Reg. 28,967 (1978).

III. IN ORDER TO INSURE UNIFORMITY OF ENFORCEMENT THROUGHOUT THE NATION, THERE IS A PRESSING NEED TO CLARIFY THE POWERS OF THE SECRETARY OF EDUCATION UNDER THE ACT.

While in practice it has fallen primarily to the States to vouchsafe the rights of the blind under the Act, the NCSAB and NASW respectfully submit that it was the intent of Congress that this responsibility would be shared with the Secretary of Education. Unfortunately, the Secretary has not, or perhaps cannot, fulfill this role. The NCSAB and NASW respectfully submit that this Court should exercise its Certiorari Jurisdiction in order to clarify the role that the Secretary of Education ought to play in enforcing the Act.

A. The Legislative History of the Act Demonstrates That the Secretary of Education Is to Both Interpret and Actively Participate in the Enforcement of the Act.

The predecessor to the Secretary of Education under the Act was the Secretary of Health, Education, and Welfare, and thus references in the Legislative History of the Act to the latter should be understood as applying to the former. 20 U.S.C. § 3441. Congress made it very clear that the Secretary of Education is to occupy a pivotal role in enforcing the Act.

> [W]ith respect to the vending stand program, the conference report requires a priority for blind vendors on Federal property. Overall regulatory authority over the program is vested in the Secretary of Health, Education and Welfare.

120 Cong. Rec. 35,711 (1974).

Elsewhere it is noted that there is under the Act "a requirement that overall authority over, evaluation of, and standards for, the program be placed in the Secretary of HEW. . . ." 120 Cong. Rec. 20,118 (1974). Senator Randolph, the principal author of the Randolph-Sheppard Act, stated in the Randolph-Sheppard hearings that ". . .

the Department of Health, Education and Welfare—HEW —is the principal agency for carrying out the Randolph-Sheppard Act." *Hearings before the SubCommittee on the Handicapped of the Committee on Labor and Public Welfare on S. 2581*, 93rd Cong., 1st Sess. 3 (1974) [in the record below as an appendix to the Brief *Amicus Curiae* of the NFB, filed with the Court of Appeals below on October 21, 1995].

Congress recognized the need for the Secretary of Education to act in an oversight capacity for the Randolph-Sheppard Act program to ensure that federal agencies would comport themselves with the mandates and requirements of the Act.

> A number of witnesses, numerous letters to the committee, and newspaper articles clearly suggested that Federal agencies had not done all that they could to insure the establishment and the maintenance of blind vendors on property under their control. In addition, certain Federal agencies were charged with imposing arbitrary and harmful limitations on blind vendor operations with respect to the kinds of merchandise a blind vendor was permitted to sell, with respect to the location of [a] blind stand, or with respect to the amount permitted to accrue to a vendor.
>
> * * * *
>
> The Committee finds that there is a record of abuses and neglect of the Randolph-Sheppard program by officials of various Federal agencies that is adequate to justify the placement of increased overall authority for its operation with the Secretary of Health, Education, and Welfare.
>
> * * * *
>
> The Committee believes that the Department of Health, Education, and Welfare should be the overseer of the Randolph-Sheppard program throughout the Federal government. As such, it is inevitable that there will be some incursion by that department in matters traditionally handled by other agencies. The Department of Health, Education, and Welfare,

> however, has the expertness and the sensitivity to the problems inherent in the blind vendor program which may be lacking in other agencies. If the program is to be coordinated, well run, and consistent, it must have a coordinator. The only possible choice for this function is HEW.

Senate Report 93-937, at pp. 16 and 19 (J.A. 157).

Although the Secretary of Education's responsibilities under the Randolph-Sheppard Act are wide and varied, one of the principal responsibilities which the Secretary is charged with under the Act is the oversight and administration of the arbitration grievance mechanism under 20 U.S.C. § 107d-1 and § 107d-2 when a dispute arises between a blind vendor and a State or between a State and a federal agency.

> The Secretary is to prescribe such other regulations as are necessary to carry out the provisions of the Act. Further Secretarial responsibilities under S. 2581 include . . . convening of arbitration panels to hear disputes betwen blind licensees and State agencies, and between State agencies and Federal agencies, and payment of arbitration costs.

Senate Report 93-937, at p. 4 (J.A. 157).

For whatever reason, however, the Secretary of Education has been strangely silent in the case at bar, and in many other instances, when the SLAs seek to enforce the Act against federal agencies. Because the actions of the DVA in the case at bar amount to a limitation on the placement or operation of a blind vending stand at the VAMC, it is indeed peculiar that the Secretary of Education was never consulted pursuant to 20 U.S.C. § 107(b), which latter section provides in pertinent part:

> Any limitation on the placement or operation of a vending facility based on a finding that such placement or operation would adversely affect the interests of the United States shall be fully justified in writing to the Secretary, who shall determine whether such limitation is justified. A determination made by the

> Secretary pursuant to this provision shall be binding on any department, agency, or instrumentality of the United States affected by such determination. The Secretary shall publish such determination, along with supporting documentation, in the Federal Register.

Shortly after the Act was adopted into law, the Secretary of Education's predecessor had no difficulty construing the meaning of the foregoing provision. According to the Secretary, at 42 Fed. Reg. 15807 (1977):

> When a federal property managing department or agency believes [there should be a limitation on the operation of a vending facility], the head of that department or agency *must* justify his position to the Secretary of Health, Education, and Welfare, who will make the final determination [Emphasis supplied].

If Congress is urged not to adopt a particular provision in a law, but nevertheless does enact same into law, the Congress is presumed to have specifically rejected the suggestions urged upon it. According to 2B Sutherland, supra, at § 49.10, p. 76:

> [Where] practical and contemporaneous interpretation [of a statute] has been called to a legislature's attention, there is more reason to regard the failure of the legislature to change the interpretation as presumptive evidence of its correctness.

In this case, a number of witnesses urged Congress, sometimes strenuously, to delete the requirement that federal property managers would have to seek a determination from the Secretary of Education as to whether the placement or operation of a blind vending facility adversely affects the interests of the United States under 20 U.S.C. § 107(b). The Administration's representative, Mr. Reedy, strongly testified in 1973 against allowing the Secretary of Education to make such determinations: "Responsibility for this finding should, however, rest with the head of the appropriate agency in consultation with the Secretary [of Education] and should not rest with the Secretary [of Education] alone." *Hearings before the*

SubCommittee on the Handicapped of the Committee on Labor and Public Welfare on S. 2581, supra, at p. 38.

In fact, the opposition in 1973 before the Subcommittee to the Secretary of Education's power to make 20 U.S.C. § 107(b) determinations was more strenuous than opposition to the arbitration procedures under 20 U.S.C. §§ 107d-1 and 107d-2. *Id.* The Defense Department was particularly outspoken in its opposition to allowing the Secretary of Education to make a 20 U.S.C. § 107(b) determination. *Hearings before the SubCommittee on the Handicapped of the Committee on Labor and Public Welfare on S. 2851*, pp. 100-101.

There was similar strong opposition from other federal agencies to vesting 20 U.S.C. § 107(b) powers exclusively in the Secretary of Education throughout the foregoing 1973 Hearing Transcript. *Senate Report* No. 93-937, at p. 19 (J.A. 147, *et seq.*) makes it clear the extent of the protests to vesting in the Secretary of Education the power he now possesses under 20 U.S.C. § 107(b):

> In addition, agency witnesses expressed concern about the interference of one Federal agency in the affairs of another. The committee believes that the Department of Health, Education and Welfare [now the Secretary of Education] should be the overseer of the Randolph-Sheppard program throughout the Federal government. As such, it is inevitable that there will be some incursion by that department in matters traditionally handled by other agencies.

Nevertheless, the Congress provided precisely what it was so strongly urged not to provide in 20 U.S.C. § 107(b). In *Boudette v. Barnette*, 923 F.2d 754, 756-757 (9th Cir. 1991), the court applied the doctrine of *expressio unius est exclusio alternius* to determine the meaning of a statute:

> This doctrine [*expressio unius est exclusio alternius*] as applied to statutory interpretation creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions

> should be understood as exclusions. . . . Thus, if a statute states that a party can invoke an action by request, such request is presumed the exclusive manner in which the action may be invoked.

The DVA has acknowledged the Act applies to it (J.A. 169; 170; 205). The NCSAB and NASW are completely at a loss to explain why the Secretary of Education was not consulted pursuant to 20 U.S.C. § 107(b) in the case at bar concerning the attempt of the DVA to limit the placement of a blind vending facility at the VAMC. Perhaps this Court can determine a method by which to more appropriately involve the Secretary of Education, thus benefiting both the blind citizens of this Country and the States which are now burdened with the responsibility of enforcing this most difficult of Federal laws.

B. The Secretary of Education Could Obviate Many of the Enforcement Problems Presented by This Act, if His Role Were Properly Defined by This Court.

The primacy of the interpretation given to an Act of Congress by an agency charged with its enforcement is virtually hornbook law in this Country. Perhaps certain federal agencies disagree with the wisdom of the Randolph-Sheppard Act, and the interpretation of that Act by the Secretary of Education, but as this Court stated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984):

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public inter-

> est are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'

Id. at 865.

The Secretary long ago concluded that under the Act any head of a federal department or agency which would essay to limit a blind vending operation on federal property must justify his position to the Secretary of Education in writing. 42 Fed. Reg. 15807. It is wrong to view the *ad hoc* arbitration panels convened by the Secretary of Education under 20 U.S.C. § 107d-1 as somehow autonomous, self-contained adjudicative bodies. The panels thus convened are clearly meant to be enforcement mechanisms of the Secretary of Education. This is undoubtedly why the Congress specified that the decisions of those panels are to be regarded as final agency action, reviewable as of right under the APA, which decisions are to be published in the Federal Register. 20 U.S.C. § 107d-2.

The NCSAB and NASW respectfully submit that it is time for the Secretary of Education to police affirmatively those panel decisions under and pursuant to the power vested in the Secretary by 20 U.S.C. § 107(b). In so doing, the Secretary can determine whether a particular panel decision is or is not in the interests of the United States, or in the interests of the States, for that matter. If the Secretary of Education is thus able to police those panel decisions, the chances of a rogue panel awarding more than is absolutely necessary to insure the civil rights of the blind will be eliminated. If the Secretary of Education thus polices panel decisions, on the other hand, the civil rights of the blind will be vouchsafed, and the possibility of "Dickinsonian *Bleak House*" litigational nightmares, such as the Eighth Circuit *Riley* decisions, will be at an end, much to the relief of the budgets and Attorneys General of the States.

Certainly, the Secretary of Education has demonstrated an ability to similarly enforce other civil rights statutes

through and by his Office of Civil Rights. *Roberts v. Colorado State Board of Agriculture,* 998 F.2d 824, 827-28 (10th Cir. 1993); *Collier v. William Penn School District,* —— F. Supp. ——, 65 USLW 2597 (E.D. Penn. Feb. 28, 1997); *Cf. Kelley v. Board of Trustees,* 35 F.3d 265, 271 (7th Cir. 1994).

Quite frankly, in the view of the NCSAB and NASW, if the intent of Congress is to be so thoroughly frustrated as it was by the holding of the Court below, then the rights of the blind and the SLAs might be better served by according to the rights of the blind under the Act the same status *vis-à-vis* federal agencies which this Court accorded to the victims of sex discrimination under Title IX in *Franklin v. Gwinnett Public Schools,* 503 U.S. 60 (1992).

CONCLUSION

For all of the foregoing reasons, the NCSAB and NASW respectfully submit that the Petitions of the MSDE and NFB for a Writ of Certiorari in the case at bar should be granted.

Respectfully submitted,

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